IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16571 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VISHAL PLASTOMER PRIVATE LTD. & 4 - Petitioner(s)
Versus
UNION BANK OF INDIA - Respondent(s)

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Appearance :
MR AJ YAGNIK for Petitioner(s) : 1 - 5.
MR N.K.KHARE, ADVOCATE FOR MR CZ SANKHLA for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 25/07/2007

ORAL JUDGMENT

1 Rule. Learned Advocate for the respondent waives service. By consent of the parties the matter is taken up for final hearing and disposal.

2. This petition has been filed challenging Notice dated 3rd March, 2007 issued by the respondent-Bank under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the Securitisation Act), 24th May, 2007 being a fresh Notice under Section 13(2) of the Securitisation Act and Notice dated 27.06.2007 issued under Section 13(4) of the Securitisation Act. The following prayers are made in the petition:

> *(4) The petitioners, therefore pray as under:-*
> *(A) The Hon'ble Court be pleased to issue a writ of mandamus and/or certiorari and writ in the nature of mandamus or certiorari or any other appropriate writ, order or direction and be further pleased to quash and set aside notice dated 3rd March, 2007*

addressed to each of the petitioners and the notice dated 24th May, 2007 addressed to petitioner No.2 as well as notices dated 27.06.2007 and to further command respondent Bank that not to disturb the vacant and peaceful possession of the immovable properties mentioned in the notice dated 3rd March, 2007 addressed to each of the petitioners and the notice dated 24th May, 2007 addressed to petitioner No.2 as well as notice dated 27.06.2007 either by themselves or their agents, servants or with the assistance from the police authority/ Chief Metropolitan Magistrate and not to take possession of such properties pursuant to the aforesaid notices or otherwise.

(B) Pending admission, hearing and final disposal of the petition, the Hon'ble Court be pleased to restrain the respondent from in any manner disturbing the vacant and peaceful possession of the immovable properties mentioned in the notice dated 3rd March, 2007 addressed to each of the petitioners and the notice dated 24th May, 2007 addressed to petitioner No.2 as well as notice dated 27.06.2007 either by themselves or their agents, servants or with the assistance from the police authority/ Chief Metropolitan Magistrate

and not to take possession of such properties pursuant to the aforesaid notices or otherwise.

Amendment carried out as per Court's order

4(BB) Pending admission, hearing and disposal of the present petition, the Honourable Court be pleased to pass ad-interim order restraining the respondent Bank from disturbing the vacant and peaceful possession of the immovable properties mentioned in the notice dated 03.03.2007 addressed to each of the petitioners, notice dated 24.05.2007 addressed to the petitioner No.2 and notices dated 27.06.2007 either by themselves or through their agents, servants or with the assistance of the Police Authority / Chief Metropolitan Magistrate not to take possession of such properties pursuant to the aforesaid notices or independently there.

(C) The Hon'ble Court be pleased to grant such other and further reliefs as may be deemed fit and proper.

(D) Cost of the petition be awarded.

3. The facts which are not disputed are that petitioner No.1 is the principal borrower while petitioner Nos.2 to 5 are the guarantors. On 03.03.2007 the respondent-Bank issued notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the Securitisation Act) calling upon the petitioner borrower and the guarantors to discharge jointly and severally outstanding liability to the tune of Rs.4,78,25,652/- Under sub-section (3A) of the Securitisation Act the petitioners moved a proposal for One Time Settlement vide communication dated 12.04.2007. It is the say of the petitioners that the said representation has not been considered and to the contrary all the petitioners have been issued notices under Section 13(4) of the Securitisation Act for taking possession of the secured assets more particularly described in the said notices.

4. The principal case of the learned advocate for the petitioners, as presented by the learned Senior Advocate, is that in light of sub-section (9)

of Section 13 of the Securitisation Act read with definition 'financial asset' under Section 2(l) of the Securitisation Act, the respondent-Bank on its own cannot initiate any action under sub-section (4) of Section 13 of the Securitisation Act because the petitioners have also availed of financial facilities from two other banks, namely, Andhra Bank and Punjab National Bank. That this fact was informed by the petitioners vide communication dated 12.06.2007, addressed by the advocate of the petitioners, and despite that the respondent-Bank has proceeded to issue the impugned notice. It was, therefore, submitted that the respondent-Bank be prevented from taking over possession of the premises in the interregnum.

5. Section 13(9) of the Securitisation Act as is necessary for the present reads as under:

> *(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or*

pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and providing his debt under proviso to sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the

workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to received the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of this sub-section,-

Explanation.- For the purposes of this sub-section,-

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

6. As can be seen from plain reading of sub-section (9) of Section 13 of the Securitisation Act, the former part of the said sub-section is divided into two different categories, namely, -- (i) where it is a case of the financing of a financial asset by more than one secured creditors; and (ii) where there is joint financing of a financial asset by secured creditors. The latter half of sub-section (9) of Section 13 of the Securitisation Act provides that in both eventualities a secured creditor shall not be entitled to exercise any or all of the rights conferred on the secured creditors under sub-section (4) of Section 13 of the Securitisation Act unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors.

7. Thus, it is apparent that financing of a specified financial asset has to be by more than one secured creditors, or there has to be a joint financing before the embargo placed by the latter part of sub-section (9) of Section 13 of the Securitisation Act can come into play. The definition of the term 'financial asset' gives a clear indication that it is in relation to any debt or receivable which is secured or unsecured, which is secured by mortgage of, or charge on immovable property etc., and hence, in so far as a secured creditor is concerned, it has to be a financial asset which is secured by the same property, namely, by the same secured asset, whether there is first charge or a second charge qua the same property. In other words, the financial asset has to be the same wherein there are different secured assets vis-a-vis different secured creditors. In the event if the financial asset is different and the secured asset is also different qua different secured creditors sub-section (9) of Section 13 of the Securitisation Act would frustrate the object of the Securitisation Act which is speedy and effective recovery of outstanding

dues of public money, if applied in the manner suggested by the petitioner.

8. In the facts of the present case the petitioners have not stated that the financial asset vis-a-vis the respondent-Bank as well as Andhra Bank and Punjab National Bank is the same financial asset, nor is it stated that even if there are different financial assets they are secured by the same property, namely, the same is the secured asset which is under consideration by issuance of the impugned notice.

9. Under sub-section (9) of Section 13 of the Securitisation Act the Explanation defines the terms “record date” and “amount outstanding”. The second term viz. amount outstanding has direct bearing in relation to applicability or otherwise of sub-section (9) of Section 13 of the Securitisation Act, because the right of a secured creditor to exercise powers under sub-section (4) of Section 13 of the Securitisation Act gets circumscribed in the event other secured creditors representing not less than

three-fourth in value of the amount outstanding on record date have not consented to such action. However, “amount outstanding” as defined by the Explanation shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of the secured asset as per books of account of the secured creditor. In other words, the amount outstanding has to be in relation to a particular creditor when there are more than one secured creditors, such amount outstanding has to be in respect of secured asset as per the books of account of such secured creditor. Thus, in a case where a particular financial asset is secured by a specific property over which one of the secured creditors has a specific charge securing the debt concerned, if there is no charge on the same property by any other secured creditor, or the financial asset is not jointly financed by more than one secured creditors there can be no occasion for invoking provisions of Section 13(9) of the Act.

10. Section 13(9) of the Act uses the words “more than one secured creditors” in the case of

financing of a financial asset, or joint financing of a financial asset by “secured creditors”; in either of the situations no secured creditor in isolation will be entitled to exercise rights conferred by Section 13(4) of the Securitisation Act in absence of consent from other secured creditors representing the specified value of the amount outstanding. Hence, there is an inherent indication that the creditor has to be a secured creditor, meaning thereby, that the financial asset has to be secured by an asset described as secured asset. Furthermore, there has to be more than one secured creditors in a case of financing of a financial asset, or in a case of joint financing of a financial asset by secured creditors, i.e. plurality of secured creditors is a sine-qua-non. There can be plural secured creditors when there is/are a secured asset/assets qua financing of same financial asset or joint financing of same financial asset. There is no dispute that such is not the position in the present case.

11. Therefore, in case of a creditor-simplicitor the restriction placed by sub-section (9) of Section 13 of the Securitisation Act cannot be applied. Therefore, where there is no charge by any other bank vis-a-vis the secured asset of the respondent-bank, such other bank cannot be termed to be a secured creditor in relation to the financial asset which is secured by the asset over which the respondent bank has charge. If this be so, as accepted by the learned Advocate for the petitioner, the other two banks remain mere creditors vis-a-vis the financial asset in so far as the respondent bank is concerned in absence of any financing of the said financial asset by any other secured creditor , or in absence of any joint financing by the secured creditors, thus not permitting applicability of Section 13(9) of the Securitisation Act.

12. In the case of *Navpad Textile Industries Ltd. Vs. Surat People's Co-operative Bank Ltd.* in Letters Patent Appeal No. 1331 of 2003 with Letters Patent Appeal No. 1332 of 2003 vide judgment dated 30.12.2004 it has been laid down by this Court :

We are unable to agree with Mr. Joshi. The learned Single Judge has succinctly dealt with the matter at issue. Sub-section (9) of Section 13 of the Act contemplates a situation where the right under Section 13 (4) is to be enforced by a group of more than one creditor, more than one secured creditor as mentioned in section 13(9) of the Act or by a consortium of creditors. In other words, the said provision would be attracted only in cases where financing of an asset is by more than one secured creditor acting jointly or simultaneously or by a consortium of creditors. It shall not be attracted where a financial assistance has been extended by an individual secured creditor. We see no reason to take any other view of the aforesaid provisions.

Further, in case where consent of the other secured creditors as envisaged by Sub-section (9) of Section 13 of the Act is required, such consent would be required before proceeding to take over possession of the Secured assets of the borrower or the management of such Secured assets or taking any other action as envisaged by Sub-section (4) of Section 13 of the Act. The consent envisaged by Sub-section (9) of Section 13 of the Act would not be required at the time of issuing notice under Sub-section (2) of Section 13 of the Act.

The Court therefore derives support from the aforesaid judgment.

13. In so far as the remaining prayers are concerned it is apparent that except for prayer to quash and set aside the impugned notices and not to disturb the vacant and peaceful possession qua the immovable properties, no other relief as such is prayed for. In absence of any other ground on merits, no case is made out for quashing and setting aside notices dated 3rd March, 2007, 24th May, 2007 and 27th June, 2007.

14. The petition is accordingly rejected. Rule discharged. There shall no order as to costs.

(D.A.MEHTA, J.)

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